No. 84–9

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

MASSACHUSETTS MUTUAL
LIFE INSURANCE COMPANY
AND CECELIA STEVENSON,

Petitioner,

vs.

DORIS RUSSELL,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether, under the Employee Retirement Income Security Act, a fiduciary to an employee benefit plan may be held personally liable to a plan participant or beneficiary for punitive damages or extra-contractual compensatory relief for improper or untimely processing of benefit claims?

PARTIES TO THE PROCEEDING

The parties to this action are Massachusetts Mutual Life Insurance Company, Cecelia Stevenson and Doris Russell. The claims against defendant Cecelia Stevenson are not at issue in this appeal to the Supreme Court.

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Respondent, DORIS RUSSELL, respectfully concurs that a writ of certiorari issue should be granted to review the judgement and opinion of the United States Court of Appeals for the Ninth Circuit

entered in this proceeding on December 16, 1983. However, Respondent prays that the Supreme Court affirm the opinion of the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 722 F.2d 482 (9th Cir. 1983), and appears in Petitioner's Appendix at 1a to 25a. The order of the United States District Court for the Central District of California granting Petitioner's motion for summary judgment, as well as the findings of fact and conclusions of law issued in connection therewith, are unreported and appear in Petitioner's Appendix at 26a and 32a.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Ninth Circuit was entered on December 16, 1983. A timely petition for rehearing and suggestion for rehearing en banc was denied by the Court of Appeals on April 6, 1984. Petitioner's Appendix at 34a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves sections 409, 501, and 503 of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. Sections 1109, 1131, 1132, and 1133 (1982), and 29 C.F.R. Section 2560.503-1

(1983) promulgated under ERISA section 503. These provisions are reproduced in Respondent's Appendix at 28 through 39.

I

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This action was filed by Respondent DORIS RUSSELL (hereinafter "Russell") to recover damages which resulted from the termination of her employment and her employee benefits by her employer, Massachusetts Mutual Life Insurance Company (hereinafter "Mass Mutual") for a period extending from October 17, 1979, until on or about March 13, 1980. The Salary Continuance Plan and Long Term Disability

plan are company funded employee benefit plans qualified under ERISA.

Russell contends that in terminating her employment and Salary Continuance benefits, Mass Mutual violated its duty to deal in good faith with her. At the time of her termination, Russell was unable to work because of a psychosomatic illness. She contends that in wrongfully terminating her benefits, Mass Mutual acted arbitrarily and capriciously and breached its fiduciary duty towards her, causing her economic damage by forcing a cash-out of her husband's retirement plan and causing further psychological damage to her pre-existing psychiatric condition.

Russell contends that Mass Mutual wrongfully terminated her employment without cause, in violation of the implied

contract of employment established by her long and exemplary service, and that Mass Mutual terminated her solely to avoid having to pay her benefits. Russell contends that Mass Mutual had knowledge that she had no source of income and was suffering from a psychological condition, and that Mass Mutual's actions were intended to inflict emotional distress upon her.

B. STATEMENT OF FACTS

Petitioner's statement of facts is misleading in that it makes no reference to the unusual facts of this case which differentiate it from a simple suit to recover benefits under the plan. The following facts should be considered by the court:

Russell, a 54 year-old woman, was an employee of Mass Mutual for fifteen (15) years as a claims examiner. On May 11, 1979, Russell was incapacitated with intolerable back pains due to stress. She had previously taken leaves of absence for back pain caused by psychiatric and psychosomatic illnesses in 1967 and 1977. Russell provided all documentation required by the Salary Continuance Plan booklet. Russell also went to a psychiatrist to attempt to deal with her psychosomatic back and neck pains and depression.

In late August 1979, Russell's claim for Salary Continuance was brought before Mass Mutual's Disability Committee for review, although the Disability Committee is not authorized to review claims under SCP. The "independent" committee, appointed

by Mass Mutual, which advises the plan administrator, applied the Long Term Disability procedure for reviewing Russell's claim which is significantly stricter than the SCP procedure.

The Disability Committee failed to review any of the past medical records of Russell at any time during their proceedings although Russell requested that they do so on more than one occasion to verify the psychosomatic nature of her illness. On September 18, 1979, the Disability Committee required Russell to submit to an unauthorized "independent" orthopedic examination by Dr. D. Rosco, rather than ask Russell's doctor for additional verification or clarification.

Dr. Rosco's report evaluated Russell from strictly an orthopedic point of view

as requested by Mass Mutual. His report failed to mention that she was seeing a psychiatrist and it mischaracterized her injuries as resulting from a slip and fall accident. Dr. Rosco corrected and clarified his report on or about November 5, 1979, but said letter was never reviewed by the Disability Committee.

On October 12, 1979, the Disability Committee convened and terminated Russell's benefits based upon Dr. Rosco's report. Russell was notified of this action in a letter from Charles Dole. Russell immediately sent a letter on October 22, 1979, to Mr. Dole demanding a review of Mass Mutual's decision, requesting a review of her past medical records, and indicating that her illness was psychosomatic and not orthopedic. She sent a letter on October

23, 1979, to the president of Mass Mutual indicating the same thing. Both letters were forwarded to the plan administrator by October 25, 1979.

Mass Mutual refused to review Russell's past medical records on file and upon receiving Russell's packet, including a psychiatrist report on or about November 23, 1979, from Dr. Ziferstein, requested another unauthorized independent psychiatric examination rather than ask for clarification from Dr. Ziferstein or Russell. This evaluation by Dr. Saul Faerstein confirmed Russell's position that she in fact suffered from psychosomatic neck and back pains and depression.

Russell had been perturbed but confident that the oversight which terminated her SCP benefits would be reinstated as

soon as Mass Mutual reviewed Dr. Ziferstein's report in late November. When, on or about December 15, 1979, Russell received notification that she was being sent to an "independent" psychiatrist and that Mass Mutual was not going to reinstate her benefits in the near future, she suffered extreme emotional trauma and a feeling of betrayal by Mass Mutual.

Russell's husband, Ronald Russell was also disabled at this time and was receiving no income. Russell and her husband came to the conclusion that there was no other alternative than to cash out his retirement plan with Los Angeles County for approximately $12,000. In doing so, Russell's husband was giving up approximately $450.00 a month for the rest of his life, commencing sometime in 1980 along with

all fringe benefits including low rates for medical, dental, and optical insurance for both of them.

Russell was reinstated to the SCP and to her employment on or about March 13, 1980, one hundred and thirty-nine (139) days after the plan administrator received Russell's request for review on October 25, 1979.

II

SUMMARY OF ARGUMENT

There are two issues presented to the Supreme Court for its review, 1) whether an ERISA fiduciary may be held liable for extra-contractual damages for a breach of fiduciary duty and, 2) whether an ERISA fiduciary may be held liable for punitive

damages for malicious, wanton, or bad faith misconduct. There is a conflict between the circuits and among the district courts on these issues. Therefore, Respondent agrees that it would be proper for the Supreme Court to review the opinion of the Ninth Circuit in order to resolve the conflict. However, Respondent contends that the decision of the Ninth Circuit is correct and should be affirmed.

ERISA provides broad legal and equitable remedies against fiduciaries who breach their duties. ERISA is remedial legislation which should be construed liberally in favor of those persons it was meant to protect, namely, participants and beneficiaries under covered pension and welfare plans. Congress intended that a body of Federal substantive law be developed

by the courts to fill in the gaps left by ERISA's provisions and to fulfill its purpose of redressing and preventing violations of the Act. Extra-contractual damages should be allowed under ERISA to remedy the wrong, make the aggrieved individual whole and compensate for mental and emotional distress. Punitive damages should be allowed in limited circumstances where the fiduciary acts with actual malice, bad faith, or wanton indifference to the rights of a participant or beneficiary.

To hold that a plan participant or beneficiary can never recover punitive or compensatory damages would immunize plan fiduciaries from liability for their intentional breaches of duty that injure plan participants and beneficiaries. Such a result is inconsistent with the express

policy of ERISA to protect the interests of participants and to provide broad legal and equitable remedies.

III

REASONS FOR GRANTING THE WRIT

The question presented for review by Petitioners is as follows:

> Whether, under the Employee Retirement Income Security Act, a fiduciary to an employee benefit plan may be held personally liable to a plan participant or beneficiary for punitive damages or extra-contractual compensatory relief for improper

or untimely processing of
benefit claims.

Petitioners contend that a review of the ruling of the Ninth Circuit with regards to punitive damages and extra-contractual or compensatory damages is essential to resolve a conflict between the Ninth and Eight Circuits and among the district courts. Respondent agrees that a conflict exists among the courts and that it would be appropriate for the Supreme Court to review the decision of the Ninth Circuit and resolve the conflict. Respondent contends, however, that the decision of the Ninth Circuit is correct and should be affirmed, and that conflicting cases should be disapproved or overruled.

IV

REASONS WHY THE OPINION OF THE NINTH CIRCUIT SHOULD BE AFFIRMED

A. INTRODUCTION

The question presented for review to the Supreme Court by Mass Mutual is misleading in that it appears to be equating mere improper handling or untimely processing of benefit claims with an award of punitive damages. The question before the court is actually a two-part question. One question is whether an ERISA fiduciary may be held personally liable to a plan participant or beneficiary for punitive damages for wanton, arbitrary, malicious, or bad faith misconduct of the fiduciary when processing benefit claims; and the other question is whether a fiduciary may

be held personally liable for extra-contractual damages for breach of fiduciary duty which may include improper or untimely processing of benefit claims. It is misleading to combine the two issues because the standards for granting punitive damages are much stricter than those for compensatory damages. Mass Mutual suggests that either a beneficiary would be entitled to both punitive and compensatory damages against a fiduciary or to neither. Russell submits that the court should review these two questions separately.

Further, Russell submits that Mass Mutual has chosen the phrase "improperly or untimely processing of benefit claims", rather than such language as "misconduct", "bad faith", "arbitrary conduct", "wanton indifference", or "malicious conduct" used

by the Ninth Circuit herin, to suggest that the Ninth Circuit found punitive and compensatory damages available in trivial and routine cases, such as where a fiduciary is a few days late in paying a claim. The Ninth Circuit clearly stated that these damages would only be available in limited circumstances for a substantial breach of fiduciary duty, and not as a matter of course.

Petitioner, Mass Mutual, leads the court to believe that the action herein is a simple and routine dispute involving employee benefits governed by ERISA. Mass Mutual contends because Russell availed herself of the ERISA appeal procedures, recovered her back benefits and was reinstated to employment, she could not be able to recover any damages for the bad faith

actions of the fiduciaries in terminating her benefits and her employment.

Russell does not dispute the fact that she was ultimately paid the salary continuance benefits to which she was entitled. The question before the Court is not whether more benefits are due under the plan, but whether the fiduciaries are responsible for any damages Russell incurred as a result of their bad faith actions towards her. In particular, the issue is whether plan fiduciaries can wrongfully deprive participants of benefits for extended periods of time and subsequently pay the participant merely the accrued plan benefits with no recourse to the participant for extra-contractual damages incurred as a direct and proximate result of the wrongful acts of the fiduciaries.

The primary purpose of ERISA was to provide plan participants and beneficiaries with greater security and more protection. It would defeat this purpose if Mass Mutual were allowed to use ERISA to shield them from all liability to Russell for their bad faith actions.

B. THE COURT OF APPEALS WAS CORRECT IN FINDING THAT ERISA ALLOWS CLAIMS FOR COMPENSATORY AND PUNITIVE DAMAGES AGAINST FIDUCIARIES

1. BENEFICIARIES ARE ENTITLED TO BROAD, EQUITABLE, AND LEGAL REMEDIES UNDER ERISA

Under 29 U.S.C. Section 1132, participants are provided broad remedies against fiduciaries who breach their duties. 29 U.S.C. Section 1109 states that any person who breaches a fiduciary duty shall be

subject to such equitable and remedial relief as the court deems proper.

The congressional intent was as follows:

> "The intent of the committee is to provide the full range of legal and equitable remedies available in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcements of fiduciary responsibilities under state law or recovery of benefits due to participants."

(Legislative History of Employee Retirement Act of 1974 Vol. III, p. 4871).

Similarly, the court stated in Bittner v. Sadoff and Rudoy Industries, 490 F.Supp. 534, 536 (E.D. Wis. 1980):

> "Congress intended to provide the full range of legal and equitable remedies available in both state and federal courts to those persons who

have been injured by those practices made unlawful by ERISA."

Mass Mutual claims that Russell is not entitled to any damages because she has received all the benefits due to her under the plan. However, it is not a prerequisite to request benefits under the plan in order to recover damages or seek other equitable remedies. Lieske v. Morlock, 570 F.Supp. 1426, 1430 (N.D. Ill. 1983), Lechner v. National Benefit Fund for Hospital and Care Employees, 512 F.Supp. 1220, 1223 (1981). At the very least, she is entitled to be compensated for the loss of her husband's community retirement plan and its benefits, and back interest on the monies withheld. It was clearly not the intent of Congress to allow a "fiduciary" to totally refuse to look at medical evidence that was

requested to be reviewed, apply the wrong standards for reviewing a claim, fail to make a timely decision within the 60-day, or with good cause, 120-day period, and then escape all liability as a matter of law by later paying merely the back benefits.

Mass Mutual does not actually contend that the conduct of the fiduciaries was not arbitrary, or that it did not evidence bad faith, wanton indifference, or malice. Mass Mutual simply states that participants are not entitled to compensatory or punitive damages as a matter of law.

Mass Mutual contends that compensatory and punitive damages are not available under the equitable and remedial relief provisions of ERISA. Mass Mutual analogizes ERISA to the Labor Management Relations Act of 1947 (LMRA) (29 U.S.C. Section

185[a]) Title VII of the Civil Rights Act of 1964 (42 U.S.C. Section 2000e et.seq.), and the Age Discrimination in Employment Act (ADEA), (29 U.S.C. Section 621 et.seq.) claiming that compensatory and punitive damages are not available under the LMRA, Title VII, or the ADEA.

The House Conference Report on ERISA stated that ERISA actions are to be regarded as arising under the laws of the United States in a similar fashion to those brought under the LMRA. 3 U.S. Code Cong. Ad. News 5106 (1947). Like ERISA the LMRA addresses itself primarily to disclosure and reporting requirements rather than to the rights and remedies of beneficiaries for wrongful denial of benefits. Significantly, the provisions of the LMRA do not exempt or relieve any

person from any liability, duty or penalty provided by any state law. (Section 309). If ERISA was patterned by Congress after the LMRA, the intent must have been to provide participants and beneficiaries with greater protection and additional remedies not heretofore available and not to deprive participants and beneficiaries of remedies which would have been available if ERISA had not been enacted.

Mass Mutual also contends that general and punitive damages are barred by Title VII. The courts have disagreed as to whether general and punitive damages are barred under Title VII. In Jones v. Trailways Corp, 477 F.Supp. 642, 648 (D.C. 1979), the court awarded general damages under Title VII for physical pain and emotional distress. Compensatory damages were also

allowed in Tidwell v. American Oil Co., 332 F.Supp. 424 (Utah 1971), Rosen v. Public Service Electric and Gas Co., 477 F.2d 90 (3rd Cir. 1973). The court ruled in Scott v. Bradley, 455 F.Supp. 672, 673 (E.D. Vir. 1978) and Spence v. Staras, 507 F.2d 554, 558 (7th Cir. 1974) that punitive damages may be awarded under the Civil Rights statutes under certain aggravating circumstances. In Kyriazi v. Western Electric Co., 476 F.Supp. 335, 340 (D.N.J. 1979), the court awarded punitive damages against the individual defendants to punish them and to deter future wrongdoing. See also Claiborne v. Illinois Central Railroad, 401 F.Supp. 1022 (E.D. La. 1974), Tooles v. Kellogg Co., 336 F.Supp. 14 (D. Neb. 1972), Developments in the Law - Title VII, 84 Harv. L. Rev. 1109, 1262 (1971).

Furthermore, like the LMRA, Title VII does not bar state remedies. 42 U.S.C. Section 2000e (7). The court stated in Spence v. Staras, supra, 558, that in civil rights actions, both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statues. In Alexander v. Gardner-Denver Co., 415 U.S. 36, 48-9 (1974), the Supreme Court stated:

> Moreover, the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination [emphasis added]."

See also Johnson v. Railway Express Agency, 421 U.S. 454, 459, 44 L.Ed 2d, 95 S.Ct. 1716 (1975).

Thus if ERISA was patterned after Title VII and the LMRA, it would appear that ERISA was designed to supplement existing state and common law remedies rather than to bar them. Further, by analogy to Title VII and the LMRA, compensatory and punitive damages could be available under ERISA in appropriate circumstances.

Mass Mutual also argues that punitive and compensatory damages should not be available under ERISA by analogy to the ADEA. Some courts have held that punitive damages and damages for pain and suffering are not allowed under the ADEA, but the ADEA provides liquidated damages in twice

the amount of unpaid wages. These liquidated damages are available to provide full compensatory relief and to deter willful violations. Dean v. American Security Insurance Co., 559 F.2d 1036 (5th Cir. 1977), Pfiefer v. Essex Wire Corp., 682 F.2d 684 (7th Cir. 1982).

Further, many courts have held that both compensatory and punitive damages are available under the ADEA in certain circumstances to realize the purpose of the act. Vasquez v. Eastern Airlines, Inc., 579 F.2d 107 (1st Cir. 1978), Combes v. Griffin Television, Inc., 421 F.Supp. 841 (N.D. Okl. 1976), Bertrand v. Orkin Exterminating Company, 432 F.Supp. 952 (N.D. Ill. 1977), Coates v. National Cash Register Co., 433 F.Supp. 655 (W.D. Vir. 1977).

Unlike the LMRA and Title VII, ERISA preempts state and common law remedies under which punitive and compensatory damages could be available. Unlike the ADEA, ERISA does not provide for liquidated damages. As the Ninth Circuit correctly stated in its opinion herein, it would be anomalous for Congress to "occupy the field" with respect to the interest of participants and beneficiaries under pension and benefit plans without providing federal protections and remedies to replace those barred. Congress intended that a body of Federal substantive law be developed by the courts to fill in the gaps left by ERISA's express provisions. Landro v. Glendenning Motorways, Inc., 625 F.2d 1344, 1351, 1356 (8th Cir. 1980).

ERISA preempts the California state causes of action that a claimant in Russell's position would have for breach of fiduciary duty, breach of covenant of good faith and fair dealing, breach of the California Insurance Code Section 790.03, and intentional infliction of emotional distress, under which she would be entitled to compensatory damages, damages for emotional distress, and punitive damages. Egan v. Mutual of Omaha Ins. Co., 24 Cal. 3d 809, 157 Cal.Rptr. 482 (1979), Delos v. Farmers Insurance Group, 93 Cal.App. 3d 642, 650, 155 Cal.Rptr. 843 (1979), Fletcher v. Western National Life Insurance Co., 10 Cal.App. 3d 658, 89 Cal.Rptr. 843 (1979), Little v. Stuyvesant Life Insurance Co., 67 Cal.App. 3d 451, 463 (1977). It would be inequitable for ERISA to preempt

all of these remedies without providing federal remedies to replace them.

ERISA is similar to the Landrum-Griffin Act, 29 U.S.C. Section 411 (1976), in that its principle objective is to safeguard the rights of workers against the abuses or excesses of the institutions that exist to serve them. The right to recover punitive and compensatory damages has been consistently upheld in cases under the Landrum-Griffin Act. International B'd of Boilermakers v. Braswell, 388 F.2d 193, 199-201 (5th Cir.) cert den 391 U.S. 935, 88 S.Ct. 1848, 20 L.Ed. 2d 854 (1968). For example, in Cooke v. Orange Belt Dist. Council of Painters, 529 F.2d 815, 820 (9th Cir. 1976), the Ninth Circuit held that punitive damages might be awarded under appropriate circumstances to serve

as a deterrent to those abuses which Congress sought to prevent. In Bise v. International Bro. of Electrical Wrkrs., 618 F.2d 1299 (9th Cir. 1979), the court allowed compensatory damages for emotional distress as well as punitive damages. By analogy to the Landrum-Griffen Act, compensatory and punitive damages should be allowed in ERISA cases.

The court stated in Landro v. Glendenning Motorways, Inc., supra, that ERISA is remedial legislation which should be construed liberally in favor of those persons it was meant to benefit and protect, namely participants in and beneficiaries under covered pension and welfare plans. In light of the legislative policy behind ERISA, the opinion of the Ninth Circuit with regard to punitive and extra-

contractual damages should be affirmed.

2. THE AVAILABILITY OF PUNITIVE DAMAGES IS IN ACCORD WITH THE POLICY OF ERISA AND WILL NOT HAVE DELETERIOUS CONSEQUENCES

The opinion of the Ninth Circuit that punitive damages are available under ERISA is based upon the legislative history, the policy of ERISA, and numerous case authorities. Congress intended to provide broad remedies for redressing or preventing violations of the Act and to provide the full range of legal and equitable remedies available in both state and federal courts. 1974 U.S. Code Cong. and Ad News, 4639, 4655, 4838, 3871. The availability of punitive damages serves a deterrent purpose.

In _Eaton v. D'Amato_, 581 F.Supp. 743 (D.C. 1980), the court held that punitive damages are available under Section 1109 where there has been a willful, malicious or outrageous breach of fiduciary duty. Other cases allowing punitive damages include _Winterrowd v. David Freedman and Co., Inc._, 724 F.2d 823 (4th Cir. 1984), _Jiminez v. Pioneer Diecasters_, 549 F.Supp. 677 (C.D. Cal. 1982), _Kann v. Keystone Resources, Inc._, 575 F.Supp. 1084 (W.D. Pa. 1983).

Mass Mutual contends (at page 5) that the availability of punitive damages against fiduciaries will have a widespread deleterious impact on the conduct of fiduciaries. Mass Mutual contends that fiduciaries may feel compelled to process or settle unjustified claims out of fear

punitive awards against them, thus transgressing the principles of prudence and reasonableness to the financial detriment of the plan. Mass Mutual also contends that qualified individuals will be deterred from serving as fiduciaries because of the possibility of personal liability.

The opinion of the Ninth Circuit herein held that punitive damages may be available only in very limited circumstances where the fiduciary acts with actual malice or wanton indifference to the rights of a participant or beneficiary. The Ninth Circuit stressed this limitation again in Winterrowd v. Freedman Co., 724 F.2d 823 (9th Cir. 1984). An ERISA fiduciary acting prudently and in good faith would have no need to worry about personal liability for punitive damages. Like any

other fiduciary, an ERISA fiduciary would only be liable for willful, malicious, outrageous, or wanton conduct.

Mass Mutual cites no authority to the effect that ERISA fiduciaries should have an immunity not accorded to fiduciaries in other capacities. In fact, ERISA fiduciaries may be held to a higher standard of conduct than required under traditional trust law. In Eaton v. D'Amato, 581 F.Supp. 743 (D.C. 1980), the court noted that it was the intent of Congress to expand the scope of fiduciary standards of conduct to assure adequate protection for the interests of plan participants and beneficiaries. See also Eaves v. Penn, 587 F.2d 453 (10th Cir. 1978).

Mass Mutual also contends (at pages 16-17) that the availability of punitive

damages will result in a proliferation of litigation in the federal court and a diminishment in the internal resolution of disputes. Considering the limited circumstances under which punitive damages would be available, it is very unlikely that a flood of unnecessary litigation would occur. In the case of frivolous claims, ERISA provides for attorneys fees to compensate for the costs of defending the plan.

With regards to Mass Mutual's contention that the availability of punitive damages will discourage settlement on the part of claimants, it is as likely that the fiduciaries of a plan will be less inclined to compromise claims short of a lawsuit where they realize that the most the plan stands to lose in a lawsuit is the amount of the benefits denied. <u>Vasquez v. Eastern</u>

Airlines, Inc, 579 F.2d 107 (1st Cir. 1978) (ADEA).

All of these arguments advanced by Mass Mutual are mere speculation. They attempt to alarm the court with emotional predictions of the allegedly deleterious consequences of allowing punitive damages. These arguments have very little basis on sound legal reasoning, legislative analysis, or case authority.

Mass Mutual argues that exposure of benefit plans to compensatory and punitive damages would endanger the financial soundness of benefit plans. Similar arguments were rejected by the court in Wadsworth v. Whaland, 562 F.2d 70, 78 (1st Cir. 1977) and Eaton v. D'Amato, supra. While protection of the financial soundness of plans is one of the aims of ERISA, the primary

aim of ERISA is to protect the rights of beneficiaries. If one were to follow Mass Mutual's argument to its logical extension, one could argue that it would be in the best financial interests of the plan to never pay any benefits at all until sued. The intent of ERISA is to protect the financial soundness of plans for the sake of beneficiaries, not at the expense of beneficiaries.

Furthermore, the issue to be reviewed herein is not whether punitive damages should be available against the plan itself, but against the fiduciaries personally. Fiduciaries should not be able to use ERISA as a shield to protect them from liability for their wrongful acts towards participants.

3. THERE IS EXTENSIVE SUPPORT IN THE LEGISLATIVE HISTORY AND LANGUAGE OF ERISA FOR THE AVAILABILITY OF EXTRA-CONTRACTUAL DAMAGES

Mass Mutual contends that its arguments with regard to punitive damages should also be applied to the issue of extra-contractual damages. However, Mass Mutual cites very little authority for the unavailability of these damages. In actuality, the cases are almost unanimous in allowing compensatory damages under ERISA.

The congressional intent was to provide for the full range of legal and equitable remedies available in both state and federal courts. Legislative History of Employee Retirement Act of 1974, Vol III, at 4838 and 4871. 29 U.S.C. Section 1109 provides for equitable and remedial relief for a

breach of fiduciary duty.

One of the equitable remedies clearly available under ERISA is restitution to make the claimant whole and to restore the status quo. Rogers v. Loether, 467 F.2d 110 (7th Cir. 1972). In a discussion of the "make whole" provisions of Title VII, the Supreme Court stated as follows in Albemarle Paper Co. v. Moody, 422 U.S. 405, 45 L.Ed. 2nd 280, 95 S.Ct. 2362 (1975):

> "Where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief...And where a legal injury of an economic character, the general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the enjury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may

be, in the situation he would have occupied if the wrong had not been committed."

Numerous cases have held that compensatory damages are available under ERISA to remedy the wrong, make the aggrieved individual whole or compensate him for mental or emotional distress. Free v. Gilbert Hodgman, Inc., 3 Empl. Ben Case (BNA) 1010, 1012 (N.D. Ill. 1982), Bobo v. 1950 Pension Plan, 548 F.Supp. 623, 626 (W.D. N.Y. 1982), Eaton v. D'Amato, 581 F.Supp. 734 (D.C. 1980), Bittner v. Sadoff and Rudoy Industries, 490 F.Supp. 534, 536 (E.D. Wis. 1980).

Mass Mutual cites the case of Bittner v. Sadoff Rudoy Industries, 728 F.2d 820, 825 (7th Cir. 1984), where the court held that ERISA conferred, under Section 1132, no right to sue in state court for mental

suffering caused by a violation of the terms of the plan. Mass Mutual also relies on the case Hurn v. Retirement Fund Trust, 424 F.Supp. 80 (C.D. Cal. 1976), where the court also found in a conclusion of law that no damages for emotional distress are available under 1132. The Ninth Circuit in its opinion herein found that compensatory damages are available under Section 1109 and therefore does not conflict with the cases cited by Mass Mutual.

The court held that compensatory damages are recoverable under ERISA in Jiminez v. Pioneer Diecasters, 549 F.Sup. 577 (C.D. Cal. 1982). The court stated as follows (at 681):

> "To hold that a plan participant or beneficiary can never recover punitive or compensatory damages would immunize plan fiduciaries from

liability for their intentional breaches of duty that injury plan participants and beneficiaries. Such a result is inconsistent with the express policy of ERISA."

C. CONCLUSION

The opinion of the Ninth Circuit herein held that extra-contractual damages are available against a fiduciary under ERISA to remedy the wrong and make an agrieved claimant whole where there has been a breach of fiduciary duty and that punitive damages are also available in very limited circumstances where there is evidence of malice, wanton indifference or other outrageous conduct on the part of the fiduciary. This is a well-reasoned opinion based upon a careful and detailed analysis of the stated policy of ERISA, the

legislative history and the decisions of various circuits.

Petitioner Mass Mutual attempts to make the decision look reckless, poorly reasoned, and in conflict with the policy of ERISA and the majority of the case authority. Through its phrasing of the question presented for review and the misleading statement of facts, Mass Mutual attempts to convince the Supreme Court that the Ninth Circuit has opened the door to a flood of trivial and frivolous litigation which will endanger the stability of ERISA plans and overburden the courts. Russell has shown that this characterization of the decision of the Ninth Circuit is misleading and incorrect.

The decision of the Ninth Circuit is in harmony with the primary purpose of ERISA

to protect the interests of participants and to provide broad remedies for redressing or preventing violations of the act. Respondent Russell respectfully prays that the opinion of the Ninth Circuit be affirmed.

Respectfully submitted,

BRAD N. BAKER
BAKER AND BURTON, P.C.

Attorneys for Respondent

July 23, 1984

APPENDIX

29 U.S.C. 1001

(a) The Congress finds that the growth in size, scope and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope, and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants and the employers, employee organizations,

and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are

losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desireable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards to be provided assuring the equitable character of such plans and their financial soundness.

(b) It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) It is hereby further declared to be the policy of this Act to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness

of such plans by requiring them to vest the accured benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

29 U.S.C. Section 1104

(a) (1) Subject to sections 403(c) and (d), 4042, and 4044, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--

(A) For the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill,

prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title.

(2) In the case of an eligible individual account plan (as defined in section 407(d)(3), the diversification requirement

of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 407(d)(4) and (5).

(b) Except as authorized by the Secretary by regulation, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)--

(1) such participant or beneficary shall not be deemed to be a fiduciary by reason of such exercise, and

(2) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's excercise of control.

29 U.S.C. Section 1109

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the

play by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this Act.

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this title if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

29 U.S.C. Section 1132

(a) A civil action may be brought--

(1) by a participant or beneficiary--

(A) for the relief provided for in subsection (c) of this section or

(B) to recover benefits due to him under the terms of his plan, to enforce

his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

* * *

(c) Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the

administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such relief as it deems proper

* * *

(e) (1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United

States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) In any action under this subchapter by a participant, beneficiary, or fiduciary,

the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

29 U.S.C. Section 1144

(a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

(b) (1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2) (A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment

companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 1136 of this title.

(4) Subsection (a) of this section shall not apply to any generally criminal law of a State.

(c) For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof,

or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

(d) Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

2a C.F.R. Section 2560.503

(g) (1) Every plan shall establish and maintain a procedure by which a claimant or his duly authorized representative has a reasonable opportunity to appeal a denied claim to an appropriate named fiduciary or to a person designated by such fiduciary,

and under which a full and fair review of the claim and its denial may be obtained. Every such procedure shall include but not be limited to provisions that a claimant or his duly authorized representative may:

(i) Request a review upon written application to the plan;

(ii) Review pertinent documents; and

(iii) Submit issues and comments in writing.

*   *   *

(h)(1)(i) A decision by an appropriate named fiduciary shall be made promptly, and shall not ordinarily be made later than 60 days after the plan's receipt of a request for review, unless special circumstances (such as the need to hold a hearing, if the plan procedure provides for a hearing)

require an extension of time for processing, in which case a decision shall be rendered as soon as possible, but no later than 120 days after receipt of a request for review.

(ii) In the case of a plan with a committee or board of trustees designated as the appropriate named fiduciary, which holds regularly scheduled meetings at least quarterly, a decision on review shall be made by no later than the date of the meeting of the committee or board which immediately follows the plan's receipt of a request for review, unless the request for review is filed within 30 days preceding the date of such meeting. In such case, a decision may be made by no later than the date of the second meeting following the plan's receipt of the request for review. If special circumstances (such

as the need to hold a hearing, if the claim procedure provides for a hearing) require a further extension of time for processing, a decision shall be rendered not later than the third meeting of the committee or board following the plan's receipt of the request for review.

(2) If such an extension of time for review is required because of special circumstances, written notice of the extension shall be furnished to the claimant prior to the commencement of the extension.

(3) The decision on review shall be in writing and shall include specific reasons for the decision, written in a manner calculated to be understood by the claimant, as well as specific references to the pertinent plan provisions on which the decision is based.

(4) The decision on review shall be furnished to the claimant within the appropriate time described in paragraph (h) (1) of this section. If the decision on review is not furnished within such time, the claim shall be deemed denied on review.